

Comments and Responses

1. Mr. Bernard McNamee by letters dated August 28, September 13, September 16 and December 11, 2000, suggested establishing an area in Southwest Florida like the Pineland Management Area in New Jersey whose ecology is protected from development and surface water is protected from being used for water supply. By letter dated August 11, 2000, he suggested periodic update of the study, that we consider giving tentative approvals for developers that apply now for development that the EIS envisions occurring in the latter part of the 20 years; expand discussion of areas of controversy to some Corps has no control over such as salt water intrusion; and start identifying locations for the inevitable water supply pipelines into the region.

Response: We do not have authority to establish such an area nor to acquire land. Updates will be made as needed on individual issues. Our long-duration permits typically provide for review periods. We recognize there are a wide variety of issues outside our jurisdiction that could have been added.

2. Ms. Beth Carlson, Lewis Longman & Walker, P.A. on behalf of Mirasol Development, L.L.C., Vanderbilt Partners II, Ltd., and Jack Parker Corporation, by letters dated October 27, 2000, and John A. Pulling by letter dated November 16, 2000, provides several suggestions. First, that there be a formal process for using site specific criteria to supercede information in the Permit Review Criteria and Individual Maps and adopt this process through appropriate rulemaking. Second, identify the data used to develop each map. Third, use current, accurate, peer reviewed data as the basis for developing the maps and criteria. Fourth, that the criteria and analysis tools be adopted through formal rulemaking procedures. Fifth, the presumption at Section 2.2.4 must be adopted through formal rulemaking ("The area shaded [on the Overlay Map in Appendix H] represent areas with high potential value for wildlife and other wetland functions compared to the remainder of the area....the Corps will presume alternative locations are available in areas of less value and expect an analysis over a large geographic area to determine whether any are practicable.")

Response: The decision is to direct Corps employees to perform certain tasks and consider certain methodologies in the performance of their reviews. This is within the normal prerogative of the agency to establish work methods and

Comments and Responses

procedures to ensure consistency and quality. These do not impose new requirements on applicants nor change the requirements for a permit decision.

3. Ms. Beth Carlson, Lewis Longman & Walker, P.A., on behalf of the Seminole Tribe of Florida, by letter dated October 27, 2000, requests that the language be included stating "...that the identification of natural resource issues on lands surrounding the reservation will not be considered when evaluating projects proposed by the Tribe on tribal lands."

Response: Language has been added.

4. Mr. Robert Pritt, Roetzel & Andress, on behalf of Michael C. Mamiye & Davide E. Mamiye, by letter dated November 8, 2000, requested that consideration be given to not include their property in the map for Panther.

Response: The panther map has been deleted.

5. Mr. Robert Pritt, Roetzel & Andress, on behalf of Katheryn Mollach, by letter dated November 8, 2000, requested that consideration be given to not include their property in the map for Panther.

Response: The panther map has been deleted.

6. Mr. Tim Durham, Wilson Miller Barton and Peek, Inc., by email dated October 2, and letter dated October 4, 2000, submitted copy of Appendix H with annotated adds and deleted language changes.

Response: Many of the changes were suggestions to include clarification of the relationship between the maps and basis on which the decision is made whether to issue a permit. Clarifications have been added.

7. National Association of Home Builders, by letter dated December 5, 2000, divided their comments into three categories. The first category is that the process used to develop the EIS are flawed in that: there is not an accurate inventory of wetland types, their functions and values, and cumulative gains or losses; that the reported 12,091 acres of mitigation compared to 4,068 acres of impacts "demonstrate that the

Comments and Responses

existing program is working well" and does not support the EIS assumption that existing mechanisms are not working well enough; does not report existing environmental benefits of mitigation banks, County purchase of lands, and other initiatives; a number of issues in the EIS are complex and confusing; all discussions regarding alternatives to the County comprehensive plans should be deleted since not related to the natural resource issues; not clear the relationship between the Overlay map and other maps; page 88 says is not a change yet page 143 says is a change from current regulatory process; is an insufficient analysis of the "no action" alternative; the Alternatives Development Group should have been formed as a formal FACA advisory committee; did not consider other alternatives such as improved coordination and general permits; instead of the EIS, develop guidance to measure cumulative effects or determining when a threshold would be reached; cumulative effects should be assessed on a watershed basis using large watersheds, that includes both impacts and mitigation, and whether impacts are temporary or permanent. The second category is that the EIS is overly broad and illegally expands the Corps' jurisdiction in that: all areas that have any probability of providing habitat are mapped and not "those areas that are truly in need of protection"; maps should be based on the process set up for designation of Critical Habitat or have site specific information to confirm natural resource; illegal to map areas with potential impacts since case law standard is actual take; cannot include other areas where only a portion of the work involves filling Waters of the United States; Corps lacks authority to dictate local land use; permit review criteria places environmental protection above all other public interest factors; includes presumptions, benchmarks and criteria instead of individualized balancing test; vagueness of proposed criteria increases difficulty to meet; presumptions need to be established by facts; proposal is duplicative of Corps and State requirements; essential to develop General Permits since this is one way to improve permit review efficiency.

Response: The EIS itself discloses the cumulative effects of all actions, both those by the Corps and by others, as intended by the NEPA. The language of the decision is written differently from the original proposal to, among other things, make clear that the use of the EIS information is to ensure Corps staff does not overlook some issue or its importance. This effort is formally providing the type of

Comments and Responses

information to Corps staff that historically and continues to be added to the professional body of knowledge used in review of permit applications. The rewrite of the decision as well as the criteria were designed to address many of the concerns stated. Regarding FACA, the ADG was not an advisory committee and therefore not bound by the requirements of that act. It acted essentially as a focus group to help the Corps define important issues, gather information to measure those issues, and to develop and compare alternatives for the DEIS. Although members of the ADG certainly offered their individual opinions, the Corps did not solicit, and the ADG did not provide, any group advice or recommendations. The Corps alone is responsible for the content of the EIS, including the determination of what alternatives were included in the EIS and the presentation and interpretation of the evaluation of those alternatives.

8. Several individuals, having a copy of the summary of the EIS, asked by letters in August, 2000, how the project would affect their property in Lehigh Acres or asked whether their property would be acquired by the Corps. These individuals include: Mr. Arthur L. Detlefsen; Mrs. N. S. JainuDeen; Mr. Terry Biggs; Mr. Donald Wolff; Mr. George Koleas; Mr. Brian T. Parker; Mr. Daniel Scott; Mr. Joseph Finley; Mr. Daniel Scott; Mr. and Mrs. Dick Nelson; Ms. Rose Vaccaro; Ms. Elizabeth Wilson;

Response: The EIS summary that was mailed in response includes a section that answers this question. Nothing in this decision changes any current permitting requirements.

9. LTC Linda Green, USAR Ret, by letter dated August 7, 2000, asked for the full copy of the EIS and provided initial comments: should not the County be asking the Corps for review instead of the other way around? did the Clean Water Act remove the power of the State to deal with wetlands? perhaps a study and report would have been more appropriate then an EIS.

Response. Sent. Noted. Some narrative has been added to the decision memo to describe the choice of the EIS process.

10. Ms. Louis and Angela Meoli, by letter dated September 2, 2000, have no comment on the Draft EIS but willing to sell their property in Lehigh Acres.

Comments and Responses

Response. Noted.

11. Mr. Paul Midney, by letter dated September 1, 2000, asked that a synopsis be written of the EIS to make it more accessible to the public.

Response. A background section was added to the decision memo.

12. Mr. Kent E. Stonner, attorney for Shell Point Yacht Club, by facsimile dated August 25, 2000, asked that the Club be exempted from the EIS because their consultants had not received the digital maps of the study and cannot tell what the impact the EIS will have on their plans.

Response. The maps have been revised and the ones that affected this site (e.g., Coastal) have been dropped for other reasons.

13. Ms. Beverly Grady, on behalf of Kathryn Mollach, and separately on behalf of Mamiye Brothers Partnership, by letters dated September 7, 2000, states that the properties are misidentified on the maps as Preservation.

Response. The maps have been revised subsequent to the comment. The property is now within two maps. For "Panther", the site is within the nine-county "Consultation Area" boundary. For "marshes," some freshwater herbaceous marsh is identified near the properties, but site specific information would confirm the presence or absence. The narratives rewritten to clarify these maps are not designating property use.

14. Mr. Timothy P. Durham, Wilson Miller, by letter dated October 31, 2000, requested that the Red cockaded woodpecker and the Florida panther maps be corrected relative to the Winding Cypress project.

Response. The maps were revised for a variety of reasons and also addresses the request.

15. Mr. John W. Vaughn, by letter dated April 9, 2001, suggests the following needs to be addressed: verify aerial photography on the ground; geology played no part in the study; your

Comments and Responses

response to a homeowner on possible presence of wetlands; placed too many hurdles in the permitting process; broad brushing whole county as wetland; advent of mitigation bank has eliminated small parcels of isolated wetlands; your history of Sabel palm road is flawed; cattlemen in the area have not seen any Florida panther for the last 7 years; whole study "reeks of "Fuzzy Math" and ideologies from the "Utopian Ivory Tower"

Response. Some of the comments appear to be misunderstandings of statements made during a public workshop and we hope this revised document better explains the purpose.

16. Collection of signed petitions "Citizens for Public Access and Use" asking "...to stop prohibiting access to areas such as Picayune Strand State Forest, Southern Golden Gate Estates via Miller Road, Everglades Boulevard and Sabel Palm Road Extension, and to stop buying out areas such as Northern Golden Gate Estates for environmental conservancy purposes."

Response. The revisions clarify the purpose of this effort, which does not include prohibitions (that only can be made after a permit application is reviewed) nor acquisition.

17. Mr. Dennis Gilkey, Bonita Bay Properties, by letter dated October 2, 2000, continues to object to the EIS because of its failure to address the following criteria: limit activities to the regulatory authority of the Corps (goes beyond wetland impacts, wildlife issues elevated as a critical component in evaluation, not reconciled differences with local land use plan); streamline permitting process (all development gets rigorous review; maps do not utilize existing data; ignores State permit process; expands permit process, emphasizes wildlife; no general permits); respect property rights (mapping essentially places moratorium on growth); base conclusion on technically accurate data and analysis (maps not at useable scale, data sources not documented, inaccuracies such as panther map shows everything east of I-75, eagle being delisted, no data from property owners); and, evaluate economic impacts to local communities. Project-specific information contradict several of the maps: Map 13 Public Acquisition (agencies not willing to purchase); Map 15 Habitat Fragmentation (wetlands highly disturbed, project will improve); Map 21 Coastal (development will preserve mangroves); Map 25 Water Quality (project meets State standards, may improve current

Comments and Responses

runoff); Maps 10, 17, 20 Audubon's crested caracara, Florida panther, Florida scrub jay (species not on site, local regulations require protection); Map 22 Strategic Habitat Conservation Area (site plan takes habitat into consideration, surrounding land developed); Maps 11, 19, 23 Bald Eagle, Red cockaded woodpecker, Wading bird rookeries (local regulations require protection); Map 14 Flowways (not located in one).

Response. The EIS goes beyond wetlands so that it can disclose the effects of actions by the Corps and by others, this disclosure encouraged by the NEPA. Regarding specific comments: wildlife is receiving attention because it is an important value of wetlands in this area; the Corps recognize that local land use plans identify where development is expected and the EIS is identifying federal Endangered Species Act and other issues that result; the Corps was hoping to streamline permitting through General Permits but both landowners and resource proponents correctly identify the need to incorporate site specific information via individual permit review; revisions have been made to the description of the use of the EIS information to make clearer that there is no permit "moratorium"; the EIS fully acknowledges the level of accuracy of the information and maps are not the same as provided by a detailed site review but it is not necessary to obtain this level of detail across two counties to identify regional issues; the economic issues are discussed in the EIS, but this effort is not changing the review requirements for a permit, but is formally providing the type of information to Corps staff that historically and continues to add to the professional body of knowledge used in review of applications. Many of the maps described have been revised or deleted, though there will still be some differences between these and what site-specific information would show.

18. Mr. Ron Hamel, Gulf Citrus Growers, by letter dated September 21, 2000, states the EIS has the potential to have very serious negative economic impacts by placing additional restrictions and regulations on agricultural land owners; maps lack accuracy and ground truthing; Corps team overlooked the 1992 study of wildlife use in citrus development; does not analyze economic impact on farmers; process weighted on the environmental side.

Response. This effort is not changing the review requirements for a permit above those already present, but it

Comments and Responses

has attempted to identify and provide information on issues that were being raised on a permit-by-permit basis. The EIS fully acknowledges the level of accuracy of the information and maps are not the same as provided by a detailed site review but it is not necessary to obtain this level of detail across two counties to identify regional issues. The Corps is aware of the study and wildlife utilization of citrus areas. The environmental issues are given attention because these are the ones that have made permit reviews difficult.

19. Erin Deady, Audubon of Florida, by letter dated September 28, 2000, submitted a list of 23 suggested changes to the EIS or Appendix H and the following general questions and comments: Lehigh Acres is important from biological standpoint so why is excluded; EIS using Collier Comprehensive plan that has been found inadequate; permit criteria are very general and not specific; not clear what future NEPA documents that will tier from the EIS; unclear what level of effort/rigor of review means; will Corps deny a permit based on cumulative effects and if so, what quantifiable measure will lead to such a denial; holistic mitigation plan preferred to case-by-case basis; How does the Corps expect to protect the resources more, if there is no change in the way permits are issued?

Response: The revisions to Appendix H have addressed many of the suggestions. Lehigh Acres is not excluded. The Comprehensive plan was used as one of several potential futures in order to estimate cumulative impacts so the "inadequacies" do not detract from how it was used in this study. The revised maps and narrative added more specificity. The future NEPA documents are EAs for individual permits. The meaning of "rigor of review" is meant to be a combination of number of manhours and level of expertise to be assigned but will necessarily remain vague as we expend time and resources on an adaptive basis in response to issues as they arise in the review process, the EIS effort is an attempt to identify these issues earlier. Cumulative effects are part of the permit decision but there are no thresholds. We also prefer holistic mitigation planning and some of the information in the EIS can contribute to that. This memo includes additional explanation of the difference between the permit process and what the EIS effort is contributing.

20. Ms. Janice L. Goldman-Carter, by facsimile dated September 7, 2000, forwarded a copy of a letter from the Big Cypress

Comments and Responses

Basin, South Florida Water Management District, to Collier County (providing suggestions for the Land Use Matrix of the revision to the Collier plan: absolute non-fragmentation of wetlands and non-disruption and restoration of historic flowways) and stated the Corps should adopt permit review criteria that are at least equally protective

Response. The Corps cannot issue such an absolute prohibition since the regulations provide for individual review.

21. Ms. Nancy Ann Payton and Mr. Kris W. Thoempke, National and Florida Wildlife Federations, by letter dated September 1, 2000, stated the ROD must: more clearly articulate the impacts described in the EIS (and that the EIS is not a complete cumulative impact assessment) and adopt criteria that actually restrict the cumulative adverse impacts of permits; adopt criteria that provides effective impact reduction instructions to reviewers and applicants (several specific recommendations provided); commit to a critical assessment of the Corps' compensatory mitigation practices; commit to implementing additional water quality mitigation measures; commit to a critical assessment of the use of Nationwides and other General Permits; include monitoring and re-evaluation provisions to update the cumulative impact analysis; and acknowledge and address the need for additional permit review staff. The letter also states the Corps has unlawfully issued permits in key natural resource areas during the EIS process, urging the corps to postpone issuance of permits. The letter also urges the Corps to supplement the EIS to incorporate best available scientific information. The specific suggestions for the criteria include: an explanation the 404(b)(1) guidelines applicability; Corps not rely just on applicant provided information; require EISs if impact key resources; preclude use of general permits if impact key resources; require avoidance of marshes or replacement must mimic hydroperiod; expand explanation of effects arising from impacts to "High Proportion Wetlands", should expand to cover all wetlands; EPA must joint Corps in requiring water quality conditions; assessment of effect shall be made in consultation with the U.S. Fish and Wildlife Service; stronger statement that Red cockaded woodpecker areas be avoided; additional clarification and cross-references to the EIS document and stronger statement that Habitat Fragmentation, Preserve, Public Acquisition, Coastal, and Strategic Habitat Conservation Areas and Flowway areas be avoided or replaced.

Comments and Responses

Response. We agree there would be advantages to going into more detail than the EIS did and developing more absolutes than provided by the proposed criteria, however, this effort was conducted within the limitation that the Corps would not be changing the regulations. The effort spent on analysis is to provide the appropriate level of detail to support permit reviews. The Corps cannot issue absolutes or restrictions but must perform individual reviews. The effort has resulted in greater specificity, understanding and explanation of the issues that has contributed to improved reviews. This effort is formally providing the type of information to Corps staff that historically and continues to add to the professional body of knowledge used in review of permit applications.

22. Ms. Nancy Ann Payton, Mr. Kris W. Thoempke, and Ms. Jan Goldman-Carter, National and Florida Wildlife Federations, by letter dated February 13, 2001, forwarded "An Economist's Critique of the Corps' Southwest Florida EIS and the Fishkind Report" by Dr. Fredrick W. Bell. Points stated include: EIS conclusions based on faulty premise that ecosystem protection detracts from, rather than contributing to, regional economic progress; EIS should have introduced more literature and examples of the relationship between wetlands to the animal populations and environmental and economic benefits to the region; EIS does not fully assess the economic benefits of the wetlands and should have used literature on non-market values rather than relying exclusively on market data; the EIS failed to recognize that tourism and retirement industries are attracted to the area by its natural amenities; the EIS did not perform an economic analysis and relied on flawed analysis of the ADG (inconsistent results), the crude explanation (fails to account for spending outside the region), and four studies (dollars per acre do not accurately measure economic benefits and do not include consideration of preserved wetlands); and the Fishkind Report that had different acre figures from the EIS, did not include changed in agricultural lands, incorrectly used a fixed productivity rate and other ratios, fails to consider the non-market value of wetlands; and incorrectly used various fixed ratios and other assumptions in the estimates of government revenues.

Response. We agree with the assessment of weaknesses of the studies incorporated into the EIS. However, one of the

Comments and Responses

premises of this effort was to gather into one place and examine existing information. For example, the four studies are the only ones that were found for this region. There is not an existing analysis of, say, the Future Land Use Plan that the Corps could have built on. By the policy in our regulations, the Corps balances on a permit-by-permit basis the economic and non-economic benefits and detriments of a wide variety of what are called public interest factors. The Regulatory Program has not converted the metric for all of these to dollars. While Dr. Bell is correct in that there are economic benefits of wetlands, there is also a very wide range in the literature on how that should be determined. The effort to resolve that is beyond this EIS effort.

23. Mr. Neil Dorrill, Partners for Environmental and Economic Progress, by letter dated October 31, 2000, submitted comments relative to sixteen concerns: FEIS is a significant departure from the DEIS and should be republished as a DEIS; fails to explain how maps were derived and how criteria will be applied during the application process; maps are overbroad or speculative; the two basis listed on which a landowner can contest the applicability of a map are too narrow; should not presume that project site on a mapped area will have potential to impact; provide a formal process to update maps and other information; presumption that "alternatives outside of mapped area are available" inconsistent with public interest review standard since based only on a single factor; none of the criteria state Corps will account for benefits of project; potential habitat (compared to occupied habitat) should not be protected or at most be given minimal weight; criteria of no net loss for specific species is modification of regulations; establishing mandatory mitigation circumscribes the flexible approach to mitigation under law; criteria 24 (requiring analysis of alternatives inside urban/suburban areas) eliminates consideration of the applicant's project purpose; for water quality, overrides structure of Clean Water Act (by improper use of the 303(d) list) and overrides State stormwater regulations (by requiring higher treatment); should consider information submitted to and decisions made by State or local agencies with overlapping jurisdiction over a resource; failed to perform an economic analysis of the resulting delays and de facto moratoriums; and, is ambiguous as to whether applies to pending applications.

Comments and Responses

Response. This memo has language clarifying the intended use of the information, among other things, that the use of the EIS information is to ensure Corps staff does not overlook some issue and that staff is cognizant of its regional and cumulative context. The major changes between the Draft and Final EIS documents were in Appendix H, which is how to implement the information in the body of the EIS. Explanations were expanded on the derivation and application of the maps. Several maps were revised or dropped for various reasons, including those that were overbroad. We removed the two listed criteria for contesting the applicability of a map and increased emphasis on use of site-specific information. Removed the presumptions related to the alternative analysis. The Corps will not adopt a formal process to update information, but will continue to provide the type of information to Corps staff that adds to the professional body of knowledge used in review of permit applications. Relative to the issue of potential vs. occupied habitat, the Corps will still identify potential habitat during its reviews in order to make its initial determination of a project's effect on a species, but the effect on the permit decision will depend on the subsequent site-specific assessment relative to the species, as explained in the greatly expanded narratives for each species. The "no net policy" is intended as a statement of a goal that individual natural resource functions impacts be offset, but the permit decision is still based on the public interest determination. The sections guiding the alternatives analysis were dropped to remove the confusion; the intent was not to change the regulations. Relative to water quality, a more comprehensive description of the basis of the action has been added. We agree and do attempt to reduce duplication with State and local regulatory agencies, but the Corps still has independent and in some areas differing role. Relative to the economic analysis, we disagree that we have imposed new restrictions or moratoriums above that already provided in the regulations, but have formally incorporated new knowledge into the reviews of issues that landowners already could and are facing in the permit process.

24. Mr. Bob Crawford, Commissioner of Agriculture, Florida Department of Agriculture & Consumer Services, by letter dated October 10, 2000, requested the comment period be extended for 120 days and that the Corps should coordinate with two State actions: the Growth Management Study Commission created by

Comments and Responses

Governor Bush; and, the revision of the Collier County Comprehensive Plan.

Response. The comment period was extended. The Study resulted in a report that included several recommendations, some of which related to natural resource issues. These generally relate to the State's implementation of actions relative to authorizations for development, and the Corps actions described by this memorandum are focused on the Corp's independent role. Compared to the original Corps proposal, revisions were made to further clarify that the Corps is not implementing new regulations relative to development that require individualized project specific reviews. The Corps action is ensuring Corps staff does not overlook some issue and that staff is cognizant of its regional and cumulative context. One product of the Collier effort, the land use-related mapping of the Immokalee Area Study, has been referenced by the revised criteria.

25. Horizon Council, Lee County, by letter dated August 31, 2000, complimented the revisions to Appendix H but have following concerns: there may be inaccuracies in the maps due to the scale; whether reviewers will apply the brief "assessment of affect" narratives in a more restrictive manner or as absolute mandates; and whether reviewers will not consider site-specific information to override the maps.

Response. The revision re-emphasizes the potential inaccuracies of the maps and use of site-specific information; for wildlife in particular, the narrative is greatly expanded to explain the assessment.

26. The U.S. Environmental Protection Agency, by letter dated September 14, 2000, recommends: the ROD makes a commitment to reduction of development-related pollutant loading and local, state and federal agencies meet to identify geographic areas best suited for use as mitigation bank sites.

Response. The Corps has worked very closely with the EPA on the water quality issue and the commitment is included in this memorandum. There are several private mitigation banks and other efforts underway. Subsequent to the comment letter, the Corps participated in several meetings hosted by the Regional Planning Council to develop a strategic conservation plan.

Comments and Responses

27. Lee County, by letter dated September 27, 2000, noted remaining key issues and then had 11 specific comments on various places in the text. The key issues are: an accurate calibrated water quality model is needed before making management decisions; trend analysis of water quality conditions need to be updated with all quality controlled available data; not able to meet until just before the comment period closed with EPA and FDEP over the water quality trend analysis; any proposed regulation changes should go through formal rulemaking; support a technical review of the EIS.

Response. The Corps recognizes the limitations of the assessment in the EIS and is careful in use of that. We agree a calibrated model with all available sampling data would be preferred, but what has been done is considered sufficient for identifying regional cumulative trends. This effort is not resulting in any changes to regulations. We continue to work with EPA and, through them, state and local agencies relative to the water quality concern.

28. Collier County Board of County Commissioners, by letter dated September 26, 2000, stated the final document should have no conflicts with the County Comprehensive Plans. Specific comments are: should include development of General Permits as an objective with specific time-frames; the appropriateness and availability of off-site mitigation is still not clear; recommend a more comprehensive water quality analysis be completed; should identify methods to minimize economic impacts to private property owners where there are conflicts with the local comprehensive plan.

Response. The Comprehensive Plan was used to estimate the potential impacts; the EIS describes potential impacts that result. The Corps was hoping to streamline permitting through General Permits but both landowners and resource proponents correctly identify the need to incorporate site-specific information via individual permit review. The narratives, particularly for wildlife, have been expanded to discuss off-site mitigation and the Corps has accepted (even preferred in some cases) off-site where the mitigation will contribute to regional natural resource protection. We agree a more comprehensive water quality analysis would be beneficial, but what has been done is considered sufficient for identifying regional cumulative trends. The EIS effort is not changing the

Comments and Responses

review requirements that already exist on property owners. It is formally providing the type of information to Corps staff that historically and continues to add to the professional body of knowledge used in review of permit applications.

29. Lee County Board of County Commissioners, by letter dated October 5, 2000, is concerned about the potential negative impact the EIS will have on the County's ability to implement their Comprehensive Plan and is not consistent with several of the "Guiding Principles" previously agreed to: the EIS has gone beyond the regulatory framework of the Corps; there is no analysis where inconsistencies with the local plans occur; rather than ensuring property rights and economic factors are given equal weight, they have been made subservient to the natural resource issues; the EIS essentially ignores the existence of State and local environmental review processes, does not shorten review time and other improvements, and instead expands the federal process; there is no analysis of the economic impacts; and failed to create the expected reliable and accurate database and question basis for maps and other conclusions. The Board recommends a technical review by State agencies.

Response. The EIS itself discloses the cumulative effects of all actions, both those by the Corps and by others, as intended by the NEPA and some of the revisions to Appendix H were made to reduce the appearance the Corps is outside its jurisdiction. Narrative has been added to clarify that the permit decision is still based on an overall balancing of the benefits and detriments of the project (the public interest factors), however the wildlife and other issues are the ones included in this memorandum since these are posing the greatest difficulty to address in current permit reviews. The Corps attempts to reduce duplication with State and local regulatory agencies but the Corps still has independent and in some areas differing role. Relative to the economic analysis, we disagree that we have imposed new restrictions or moratoriums above that already provided in the regulations, but are formally incorporated new knowledge into the reviews of issues that landowners already could and are facing in the permit process. While this did not result in a formal database, other than the bibliography, the information and the analysis are not dissimilar from those used in permit reviews. The particular map that the letter refers to (Florida panther) has been revised

Comments and Responses

to delete unpublished information. Rather than analyze the entire document, we continue to work with other Federal, State, and local agencies on the individual issues to ensure we are applying the information appropriately to permit decisions.

30. The Economic Development Council of Collier County, by letter dated October 30, 2000, was substantially identical in text to the letter from the Lee County Board of County Commissioners, dated October 5, 2000.

31. The State Clearinghouse, Florida Department of Community Affairs, by letter dated October 30, 2000, forwarded comments from the following agencies.

a. Florida Department of Environmental Protection notes: the EIS on page 47 states 17 federally listed and 45 state listed faunal species occurring in the study area could be affected but does not state whether positive or negative and the effects on plant species is not addressed and recommends the EIS should list which species could be delisted as the result of the proposed actions.

Response. Other than certain species, the EIS evaluates the effects on habitat in general terms.

b. Florida Fish and Wildlife Conservation Commission states: Table 3 of the EIS should reflect that all of the scrub jay, red-cockaded woodpecker clusters, bald eagle nests, and woodstork rookeries are protected under Ensemble S; Section on Florida panther should note presence in CREW and other counties; no criteria for West indian manatee, American crocodile, and sea turtles; the assumption by the Corps that proposals are economically viable and needed simply because an application has been filed is erroneous since many projects in the study area are pursued for permits and then do not develop; indicate how progress will be monitored; and, address the net wetland area losses that are occurring with the use of WRAP.

Response. Relative to Table 3, noted. The additional panther range has been included in the revised criteria. We did not include the Manatee, crocodile, and sea turtles since the EIS emphasis was on the watershed. For the Manatee, the Corps has prepared separately analysis. We recognize the speculative nature of some applications but by the

Comments and Responses

time of decision on the application we have worked with the applicant to understand the project purpose and alternatives. The loss of spatial extent of wetlands under the program is discussed in the EIS. This memorandum includes a monitoring report.

c. South Florida Water Management District states: there are extensive gaps in the water quality data used to generate the trend analysis, some should be left out, and document does not offer conclusions how to solve; there are no clear cut guidelines established for which actions may or may not effect listed species; there is no guidance regarding how the factors identified in Appendix H must be looked at as part of the total evaluation.

Response. Regarding water quality analysis, we note the comments and observe that any such analysis could be improved and further improved. The criteria for the species have been substantially expanded and we continue to work with the U.S. Fish and Wildlife Service to increase the celerity. This memorandum provides narrative to better explain the role within the total evaluation.

d. Southwest Florida Regional Planning Council, at their August 18, 2000, meeting, voted to request that the Corps hold a series of workshops to more fully explain how the EIS will improve the Regulatory Process.

Response. Workshops were held subsequent to this letter.

32. The National Wildlife Federation, by letter dated December 5, 2002, forwarded a copy of their "Road to Ruin" report on the Corps program in the EIS study area and asked the ROD: rigorously applies the avoidance and minimization requirements of the 404(b)(1) guidelines; announce a re-evaluation and modification of the Corps' wetland assessment and mitigation policies; adopts tougher water quality permit conditions; announces a re-evaluation and restriction of Nationwide Permits; announce a consultation and EIS regarding all Corps-permitted development that may affect the Florida panther; announce a decision to conduct Corps "isolated wetlands" determinations in consultation with EPA and consistent with U.S. Supreme Court and appellate court decisions; announces a decision to focus and

Comments and Responses

expedite West Everglades restoration efforts to acquire and restore key resource areas identified in Appendix H.

Response. The intent of this EIS was not to change current permit regulations and therefore the Corps will continue to apply the 404(b)(1) guidelines as so required. One result of this EIS is that the Corps is increasing the sophistication of the assessments: several years ago, we started using a numeric assessment and are working with the State on improvements and now, with the maps and associated narratives attached to this memorandum, are formally directing our Staff to overlay this "general purpose" assessment with assessment methods tailored for the particular issues that apply to the project. Regarding water quality, this memorandum includes provisions for assessing the post and pre-project water quality. Regarding Nationwide permits, this EIS looks at wetland fill and does not differentiate by permitting types. The applicability of the Nationwide permits within the EIS study area is appropriately done as part of a comprehensive review at the time the permits are being considered for renewal. Regarding the Florida panther, Section 7 of the Endangered Species Act provides consultations performed on individual applications. Regarding "isolated wetlands", the determination of jurisdiction was not within the scope of this EIS. Regarding acquisition, the Corps Regulatory Program has no authority to acquire land.

33. The report "Road to Ruin" included these major conclusions.

a. Corps is allowing a massive and extraordinary amount of wetland destruction.

Response. The EIS predicts that the wetland fill after 20 years ranges from 5.5 to 7% of total wetlands present. To put this into perspective, 48% of the study area is wetland, 13% is undeveloped upland, and the EIS predicts that from 38-42% of uplands will be developed.

b. The EIS confirms that current permitting ("status quo") is degrading the Western Everglades Ecosystem.

Response. The EIS presented five "futures" and the potential environmental effects for some issues and in some cases indicate a potential decline. The EIS did not include mitigation. The EIS information improves our ability too

Comments and Responses

incorporate into individual projects appropriate measures to avoid, minimize, and compensate for identified effects.

c. "There is good reason to believe Corps, EPA and FWS officials are backing down from their public trust duties because of pressure from powerful development interests and lobbyists."

Response. No examples are given to describe the generalized statement of opinion. However, we are applying the information gained from this EIS process in our permit reviews.

d. "The Corps and SFWMD are sanctioning drainage and development proposals...taxpayers may one day be forced to pay the Corps to repair the damage..."

Response. Permits are issued using best available information to incorporate measures in project designs to avoid, minimize and compensate for project effects.

e. "...actual recent rate of wetland loss...is substantially higher then the 500 acres/year that the Corps estimated it was permitting in this area before the EIS process ever began."

Response. Any statement on trend must recognize that wetland acre figures vary widely year to year, see figure 2 of Enclosure (4). The historic rate of permitting reported by the EIS (based on 8-1/2 years) is 508 acres per year. The NWF figure of 880 acres per year is based on a shorter period (4-1/4 years) and also includes excavation. If we dropped one very large permit (for the SWFL Regional Airport's new terminal) and also drop the excavation, the NWF number would be 585 acres per year, only 15% higher then the EIS historic rate. The EIS predictions (for 20 years) range from 728 to 1,059 acres per year, not surprising given development is moving into wetter areas.

f. The National Academy of Science study that shows some of the required mitigation is never attempted and that much of what is attempted does not successfully replace wetland acres or functions lost to development.

Comments and Responses

Response. Our permits require submittal of monitoring reports. We check for receipt of those reports as well as perform site inspections on a sample of projects. The general body of knowledge on how to design and assure success of mitigation has increased ever since the Regulatory Program started in the 70's. Some of the key lessons from the NAS report have been formally issued to Corps staff through Regulatory Guidance Letter 02-02

g. The Corps mitigation requirements result in a net loss of more than 2,700 acres in the past four years. Only 2.6% of the 8,800 acres of mitigation will actually offset impacts.

Response. As described in Section 4.2 of the EIS, each project that degrades the functions & values of a wetland must replace those functions & values by either establishment of new wetlands or restoration of functions in degraded wetlands. This will result in fewer wetland acres but equivalent level of wetland functions. In Southwest Florida, one common form of restoration is to remove the exotic tree *melaleuca* since its presence degrades habitat functions. In calculating the 2.6%, NWF does not include this restoration effort.

h. Jacksonville District's annual wetland loss rate is high compared to most regions in the country.

Response. The ecological settings are different.

i. Permits are being issued in areas identified on the maps in Appendix H, further degrading these resources. 84% of the Individual Permits issued since 1998 have been in areas identified by the EIS as critical to at least two key natural resources. 45% of the Nationwide Permit approvals have been in areas identified as critical to five or more resources. Corps has allowed this significant harm to the environment with no public notice and minimal review.

Response. Just because a project is located in a mapped area does not mean that the resource is automatically degraded. First, the identification of which projects "hit" a mapped resource was designed to be conservative. Based on site-specific information, the issue may not have found to apply during the review of each application. Second, our individual

Comments and Responses

permit reviews look at how the project can avoid, minimize, and compensate for the project's effect on those resources. Regarding public notices, there is no requirement for individual public notices for requests landowners submit to the Corps requesting verification that their project meets the conditions of a Nationwide Permit. We wish to note that the 173 Nationwides in the NWF dataset reflect a total of 80 acres of fill while the 111 Individual permits reflected 3,000 acres of fill. Therefore, the potential effect from the Nationwides is relatively smaller and has enabled concentration of review effort on the larger individual permit applications.

j. The law prohibits issuance of a permit where there is an alternative, and a non-wetland alternative is presumed to be available for projects that don't have to be located in wetlands. Corps has accepted the developer's perfunctory alternatives analysis instead of requiring them to avoid the wetlands.

Response. The law is more complicated than this, for example, the "prohibitions" are "rebuttable" presumption. We review the applicant's submittals, match it with our knowledge of the area, and ask questions and supplement it as appropriate.

k. Corps issues determinations that wetlands are isolated (and therefore "no jurisdictional") at the behest of the developers only and without any public notice or consultation with EPA.

Response. Since the determination is whether or not wetlands are located on the developer's property, it is naturally the developer who asks for that determination. There is no requirement for public notice or consultation with EPA on JDs.

l. Corps not including in permitting statistics the acres of "isolated" wetlands that are lost.

Response. So we don't track since we do not regulate.

Comments and Responses

m. Recent "isolated" determinations ignore existing hydrologic connections, or dismiss them as being "severed" by roads, berms, developments, or man-made barriers.

Response. We do not ignore or dismiss hydrologic connections. Every site is unique and we make our determination based on site-specific information.

n. Corps continuing to make these determinations when EPA has told Corps that the barriers only "appear" to sever hydrologic connections.

Response. This appears to be a particular project and EPA nor we have not been able to identify.

o. Corps letting the developers renege on their promises to protect wetlands within their developments now those wetlands are isolated.

Response. If the wetland was enhanced, restored, or otherwise a component of mitigation for a permit, then they have to seek a modification of the permit.

p. Corps not responded to the Agency on Bay Management request for the location of wetlands where the Corps jurisdiction has changed.

Response. We have responded to the letter.

q. Developers are still buying key resource lands with the expectation of building on them and profiting from them. Corps delayed the EIS and therefore signaling "business as usual" to the developers.

Response. The developers are as aware as we are of the information in the EIS. Those undergoing permit reviews since the EIS have seen differences in our reviews depending on the location of the project. Developers buying land with hopes of profit is called "speculation" and that has occurred and will continue in Florida with or without the EIS. On the other hand, we have seen several applications incorporating information from the EIS, which propose the preservation and enhancement of flowways for example.

Comments and Responses

r. Corps continues to authorize projects located in historic flowways that are identified by the EIS.

Response. We are seeing projects submitted by the landowners are more responsive to the flowway issue. They are designing the footprint to remain out of the flowway and even restore them.

s. Corps continues to authorize projects that will likely continue water quality degradation.

Response. We presume that the permit issued by the State is conclusive that the project will meet water quality standards. The EIS analyzed past 30 years of data and detected a downward trend in many basins. It also looked at two future scenarios (20 year) and estimated a downward trend. Using this information, EPA identified several applications where additional water quality treatment above the State permit requirements was needed. This memorandum includes methods to assess incoming applications for this issue.

t. Corps is dismantling the Estero Bay Watershed.

Response. We are giving its watershed a lot of attention. Also, we continue to increase the staff in our Ft Myers office.

u. 36% of the 111 major development projects are in panther habitat identified by the EIS. 55% of the proposed projects are in panther habitat. Corps is issuing these when there no question that such a loss of habitat is substantially reducing the likelihood of the panther's survival.

Response. For projects that may affect the panther, we consult with FWS to obtain their opinion. We also do an independent review.

v. Corps continues to accept FWS concurrence of "no adverse effect" or "no jeopardy" opinions when there is no question that their opinions are being rewritten based on politics rather than "best scientific and commercial data available"

Comments and Responses

Response. We have no opinion on the NWF's accusation that FWS is acting out of politics rather than a professional evaluation of the facts. The FWS is the federal agency with the expertise in this area.